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When Hearsay Is Admissible

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Ruth Shippen Musgrave, formerly Ruth Musgrave Silver, has joined the law firm of Campbell, Byrd & Black, Post Office Box 2208, Santa Fe, New Mexico 87501; Phone: (505) 988-4421.

James M. Curry IV and *E. Maire Butler* announce the partnership of Curry and Butler, Attorneys at Law, 125 Eubank Blvd., N.E., P.O. Box 13073, Albuquerque, New Mexico 87192; Phone: (505) 293-7877. The firm invites referrals.

News Briefs

Disciplinary Note

The Disciplinary Board has recently received a number of complaints relating to attorney retainer agreements and clauses which either lend themselves to varied interpretations or are inherently unfair to the client.

One such complaint involved a situation wherein a woman had retained a law firm to pursue her claims arising out of injuries to herself and damage to her car sustained in an accident. The contingent fee agreement gave rise to several problems.

One paragraph contained the following language:

"Client, in consideration of services rendered and to be rendered by Attorneys to client, hereby retains Attorneys to represent her in a claim and cause of action arising out of a certain automobile accident whereby [Defendant] is believed to be liable and against any other responsible parties, insurance carriers, and/or whomsoever may be liable to Client for or arising out of such accident."

The agreement went on to provide that the attorneys would be entitled to 33 percent of any such amounts recovered.

The client's own insurance carrier paid her $15,000.00 under the uninsured motorist clause of her insurance contract, after her attorneys had ascertained that the defendant did not have insurance. Her attorneys proceeded to sue the defendant. During the course of the litigation, however, it was found that the defendant was judgment proof. The attorneys felt that further pursuit of the case would be futile under the circumstances, and the client agreed.

Shortly thereafter, the attorneys advised the client that pursuant to the fee agreement she was obligated to them for $5,000.00, one-third of the amount she had received from her own carrier over one year previously. This claim was made despite the fact that the attorneys had performed very little work on collecting the $15,000.00. When the client refused to pay this amount, the attorneys sued her but subsequently dropped their claim.

A reviewing officer agreed that the paragraph was ambiguous and that a general reference to "insurance carriers" was insufficient to put the client on notice that her own attorneys would claim a portion of any reimbursement from the client's own company. It was further felt that where the attorney's investment of time in reaching such a settlement is minimal, only an hourly rate should be charged.

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Disciplinary Note

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Of even more concern, however, was this paragraph in the fee agreement:

"Should Client refuse to accept a settlement offer which Attorneys advise to so accept, and after a trial on the merits or appeal judgment is obtained in a lesser sum, then in that event, Attorney's contingent fee shall be based on the settlement figure refused by the Client plus New Mexico Gross Receipts Tax thereon."

It appears that under this clause, although the client had retained her attorneys on a contingency basis, she could potentially win a judgment for a nominal amount and yet owe her attorneys a substantial sum. This would occur if the client rejected a $90,000.00 offer and then a jury found for the client in the amount of one dollar; the client would owe her attorneys a $30,000.00 fee. It was also noted that under the retainer agreement if the decision to go to trial resulted in a verdict of $270,000.00, the attorneys did not feel that their fee was limited to a percentage of the rejected amount.

While this cause was not the basis of the complaint, the reviewing officer felt that such a clause was very one-sided in favor of the firm and could easily result in overreaching by the attorneys. When a client obstinately refuses to accept a generous and reasonable offer of settlement, the attorney's remedy is to request leave of the Court to withdraw on grounds that the client's actions were rendering effective representation unreasonably difficult (Rule 2-110 [c] [1] [d]) and to seek compensation in quantum meruit.

In a similar matter, an attorney's retainer agreement contained the following clause:

"Attorney will communicate all offers of settlement, if any to Clients. However, Clients grant to Attorney the full and exclusive right to either accept or reject any offer deemed by Attorney, in its sole and exclusive judgment, to be reasonable. Clients indemnify and hold harmless Attorney from its decisions in either accepting or rejecting any settlement offer, and agree to be bound by the terms thereof. Clients acknowledge and agree that Attorney may elect to accept an offer Clients deem too low or reject an offer Clients deem adequate at its sole discretion and agree to same."

This clause was directly contrary to Ethical Consideration 7-7 which states that "in civil cases, it is for the client to decide whether he will accept a settlement offer . . . ."

Neither of the last two clauses had been enforced. Consequently, the attorneys were issued, pursuant to Rule 8(b) (3) (ii) of the Supreme Court Rules Governing Discipline, letters cautioning them to eschew such clauses in the future.

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IOLTA

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Q. *What are the projected benefits of such a program in New Mexico?*

A. As part of its study, the IOLTA committee queried a cross-section of New Mexico lawyers to determine how much money might be available under the program guidelines. The names of more than 200 law firms were pulled from the biographical section of Martindale-Hubbell for the sample. Seventy-seven firms -- or 37 percent -- responded. The reporting firms represented a total of 506 lawyers -- or an average of seven lawyers per firm. As of Dec. 1, 1982, the firms reported the average balance of non-interest-bearing client trust accounts over the last year. The total for the reporting firms was $1.23 million. The average balance of non-interest-bearing accounts amounted to $2,434 per lawyer. Using an approximate Bar membership of 3,000, the committee estimated that as much as $7 million could be held at any given time in unproductive accounts. Even scaling down the estimate to $5 million at any one time, the committee calculated that a standard 5.25 percent savings rate could generate $262,500 a year for law-related charitable projects.

Q. *Why aren't these trust funds placed in interest-bearing accounts to benefit the clients?*

A. Larger trust funds may be kept in separate ac-

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